

Management Alert



If Pain, Yes Gain—Part XX: Chicago City Council Set to Make Sick Leave a Reality

By Joshua D. Seidman and Tracy Billows

Seyfarth Synopsis: On June 16, 2016 the Chicago, IL City Council's Committee on Workforce Development and Audit recommended that the city adopt a mandatory paid sick leave ordinance—the first of its kind in the state. This week, the full City Council is expected to vote on and pass the ordinance making Chicago the latest, and one of the most significant additions to the country's mandatory paid sick leave movement.

On Wednesday, the Chicago City Council has an opportunity to add the Windy City to the constantly expanding list of mandatory paid sick leave laws that have swept the nation.¹ The stage was set when, on June 16, 2016, the Council's Committee on Workforce Development and Audit passed the Chicago Minimum Wage and Paid Sick Leave Ordinance ("PSLO") and recommended that the full Council follow suit. In light of this recommendation and the support of Chicago Mayor Rahm Emanuel, Chicago sick leave is primed for passage.

If passed, the PSLO will become effective on July 1, 2017. As discussed in greater detail below, some of the primary requirements that would be imposed on covered Chicago employers include:

- Employees must accrue paid sick leave ("PSL") at least as fast as one hour of PSL for every 40 hours worked, up to a maximum of 40 hours per 12-month period. Despite generally stating "12-month period," the PSLO appears to require that employers use employees' respective anniversary dates to calculate the 12-month period.
- Employees can carry over *up to half* of their accrued, unused PSL, up to a maximum of 20 hours, from one year to the next. In addition, if an employer is subject to the Family Medical Leave Act ("FMLA"), each eligible employee is allowed to carry over up to 40 hours of accrued, unused PSL at the end of the 12-month accrual period to use *exclusively* for FMLA covered purposes.
- While the PSLO generally allows employers to limit employees' PSL usage to 40 hours in a 12-month period, if an employee uses the carried over 40-hours of FMLA leave, the employee is entitled to use an *additional* 20 hours of accrued PSL in the same 12-month period.
- Covered "family members" *include* individuals related by blood or whose close association with the employee is the equivalent of a family relationship.

¹ Chicago joins a growing list of states and municipalities that impose paid sick leave obligations on employers. The existing statewide mandatory paid sick leave laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; and (5) Vermont. For most covered employers, the Vermont law becomes effective on January 1, 2017. The existing municipal paid sick leave laws include: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) New York City, NY; (7) Jersey City, NJ; (8) Newark, NJ; (9) Passaic, NJ; (10) East Orange, NJ; (11) Paterson, NJ; (12) Irvington, NJ; (13) Los Angeles, CA; (14) Oakland, CA; (15) Montclair, NJ; (16) Trenton, NJ; (17) Bloomfield, NJ; (18) Philadelphia, PA; (19) Tacoma, WA; (20) Emeryville, CA; (21) Montgomery County, MD; (22) Pittsburgh, PA; (23) Elizabeth, NJ; (24) New Brunswick, NJ; (25) Spokane, WA; (26) Santa Monica, CA; (27) Plainfield, NJ; (28) Minneapolis, MN, and (29) San Diego, CA. The Los Angeles, CA law becomes effective on July 1, 2016. In addition, Los Angeles has a separate paid sick leave ordinance, which has been in effect since November 2014, that adds further compliance obligations on certain "hotel employers." The San Diego, CA ordinance is expected to become effective in July 2016. The Plainfield, NJ ordinance becomes effective on or about July 15, 2016. The Montgomery County, MD law becomes effective on October 1, 2016. The Spokane, WA and Santa Monica, CA laws become effective on January 1, 2017. The Minneapolis, MN law becomes effective on July 1, 2017. The Long Beach, CA and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015, however, in December 2015 the law was deemed "invalid and unenforceable" by a Pennsylvania state court (the city's appeal is pending).

Which Employers Are Covered Under the PSLO?

The PSLO would apply to any individual (including partnership, association, corporation, limited liability company, business trust, or any person or group of persons) that gainfully employs at least one eligible employee. To qualify as an employer, such individual, group, or entity must maintain a business facility within the geographic boundaries Chicago and/or be subject to one or more of the license requirements in Title 4 of the Chicago Municipal Code.

Notably, the PSLO expressly states that employers who afford their employees paid time off in an amount and manner that meets or exceeds the PSLO's minimum standards and requirements, would *not* be required to provide additional paid sick leave.

Which Employees Are Covered by the PSLO?

The PSLO defines "employee" using the same definition as that in state's existing Minimum Wage Law, with caveats for domestic workers and individuals working for small employers. Accordingly, the PSLO would cover any individual permitted to work by an employer, including domestic workers and regardless of the number of individuals in the employer's workforce, who works in Chicago for at least 80 hours in any 120-day period.

To be eligible, it is likely that employees will also have to, in any particular two-week period, perform at least two hours of work for an employer within the geographic boundaries of the City. Time spent traveling in Chicago that is compensated time, including, but not limited to, deliveries, sales calls, and travel related to other business activity taking place within the City, will constitute "work within the geographic boundaries of the City." Time spent traveling in the City that is uncompensated commuting time will not.

The PSLO would exclude a number of workers from coverage, including (a) certain employees employed in agriculture or aquaculture, (b) outside salesmen, (c) members of a religious corporation or organization, (d) an individual permitted to work "[a]t an accredited Illinois college or university employed by the college or university at which he is a student who is covered under the provisions of the Fair Labor Standards Act," (e) certain motor carriers, and (f) any employee working in the construction industry who is covered by a bona fide collective bargaining agreement. Although silent on the topic, the PSLO also would likely not cover properly classified independent contractors.

How Much Sick Time Can Employees Accrue, Use, and Carryover?

Employees begin accruing PSL on the first calendar day following the start of their employment or on July 1, 2017, whichever is later. The PSLO notes that new hires are entitled to use accrued PSL 180 calendar days after the commencement of their employment. The law is silent on whether this 180-day usage waiting period applies to employees who work for the employer on July 1, 2017.

Employers would be required to allow eligible employees to accrue PSL at least as fast as one hour of PSL for every 40 hours worked, up to a maximum of 40 hours per 12-month period. In most circumstances (see below), the PSLO also sets a 40-hour PSL usage cap per 12-month period. The PSLO expressly states that the 12-month period shall be calculated from when the employee started accruing PSL, or in other words, based on the employee's anniversary date. Employers would be able to limit employees' use of PSL to a reasonable minimum increment, not to exceed four hours per day.

As is often the case with PSL ordinances, understanding the laws' requirements on what happens to accrued, unused time at year-end can be challenging for employers. The PSLO's year-end carryover provision is no exception. The PSLO states that employees are entitled to carry over up to half of their accrued, unused PSL, up to a maximum of 20 hours, from one year to the next. In addition, the PSLO explains that if an employer is subject to the FMLA, each eligible employee shall be allowed to carry over up to 40 hours of accrued, unused PSL at the end of the 12-month accrual period to be used *exclusively* for FMLA covered purposes. If an employee uses the carried over 40-hours of FMLA leave, the employee is entitled to use *no more* than an additional 20 hours of accrued PSL in the same 12-month period.

Under What Circumstances May Employees Use Sick Leave?

If passed, an employee would be able to use PSL earned under the PSLO for any of the following reasons:

- When the employee or a covered family member is ill or injured, or is receiving medical diagnosis, care, or treatment, or preventive medical or health care;
- Certain absences of the employee or the employee's family member who is a victim of domestic violence or "a sex offense" as defined in the Illinois Criminal Code of 2012; and
- Closure of the employee's place of business or the employee's child's school or place of care by order of a public official due to a public health emergency.

The PSLO defines "family member" to include an employee's child, legal guardian or ward, spouse under the laws of any state, domestic partner, parent, spouse or domestic partner's parent, sibling, grandparent, grandchild, or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

While the above list of covered uses and corresponding family members is quite broad, the PSLO does allow employers to take disciplinary action, up to and including termination of employment, against an employee who uses PSL for an unprotected purpose.

What is the Rate of Pay for Sick Leave?

Employers would be required to compensate an employee who uses PSL at the same rate and with the same benefits, including health care benefits, that the employee regularly earns during hours worked. If an employee works in a position that customarily includes gratuities, the employee would be entitled to receive at least the full Chicago minimum wage when being paid for used sick leave.

What Notice Must Employees Provide When Using a Sick Day?

If the need to use PSL is reasonably foreseeable, the PSLO allows employers to require up to seven days' advance notice of the intention to use PSL. The PSLO notes that "reasonably foreseeable" includes, but is not limited to, prescheduled appointments with health care providers for the employee or a covered family member, and court dates in domestic violence cases. If the need to use PSL is not foreseeable (i.e., a sudden illness), an employer may require an employee to give notice as soon as practicable on the day the employee intends to take PSL by notifying the employer via phone, e-mail, or text message.

Can Employers Require Employees to Provide a Medical or Other Certification?

The PSLO allows employers to require reasonable documentation that the employee used PSL for a permitted purpose only when the employee is absent for more than three consecutive workdays. Such documentation includes documentation signed by a licensed health care provider, or where an employee is absent to care for a victim of domestic violence or covered sex offenses, a police report, court document, a signed statement from an attorney, a member of the clergy, or a victim services advocate, or any other evidence that supports the employee's claim, including a written statement from him or her, or any other person who has knowledge of the circumstances. Employers cannot delay employees from taking PSL, or from paying employees for used PSL, because the employee has not yet submitted the required documentation.

What Notice Must Employers Provide?

Covered employers would be required to post a notice advising employees of their rights under the PSLO in a conspicuous place at any workplace or job site that is *located within* the geographic boundaries of the City. The Chicago commissioner of business affairs and consumer protection shall prepare a model notice for employers to use. The PSLO expressly exempts the following from this posting requirement: (a) employers that do not maintain a business facility within the geographic

boundaries of the City and (b) households that serve as the worksites for domestic workers.

In addition, every employer would be mandated to provide a notice advising an eligible employee of his or her rights under the PSLO when the first paycheck subject to the PSLO is issued to the employee.

What Records Must Employers Maintain?

The PSLO appears to be silent on employers' specific recordkeeping obligations. Illinois employers generally have recordkeeping requirements regarding wages, hours worked, overtime, etc., and thus best practice would be to include recordkeeping for PSL as well. We will advise you on any updates.

What Can Employers Not Do?

Employers cannot (a) discriminate or retaliate against an employee who exercises his/her rights under the PSLO, (b) use their absence-control policy to count PSL as an absence that triggers discipline, discharge, demotion, suspension, or any other adverse activity, and (c) require, as a condition of an employee using PSL, that the employee seek or find a replacement worker.

Must Unused Sick Leave Be Paid Upon Employment Separation?

Employers are not obligated to cash out an employee's accrued, unused PSL upon separation of employment.

What Should Employers Do Now?

Chicago employers should begin taking steps to ensure that they will be able to achieve full compliance with the PSLO by the law's July 1, 2017 effective date. These are among the actions to consider:

- Review their sick days, sick leave or paid time off ("PTO") policies and procedures immediately to ensure that they meet at least the minimum requirements of the PSLO no later than the law's July 1, 2017 effective date. Employers will need to make sure the policy complies not only with the amount of time to be provided to employees but also with usage requirements, increments of use, carryover, etc.
- Develop a new Chicago paid sick leave policy that complies with the PSLO for any employees who are not covered under existing paid sick leave or PTO policies.
- Review and, as necessary, revise anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the PSLO.
- Prepare to comply with the PSLO's posting and notification requirements.
- Monitor the Chicago commissioner of [business affairs and consumer protection website](#) for template notices and other guidance and updates on the PSLO.
- Train supervisory and managerial employees, as well as HR, on the law's requirements.

If you would like further information, contact your Seyfarth attorney, [Joshua D. Seidman](#) at jseidman@seyfarth.com, or [Tracy Billows](#) at tbillows@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | June 21, 2016

©2016 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.